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NO._____

UNITED STATES SUPREME COURT

OCTOBER TERM, 1984

IN RE MICHAEL A. WEISS

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI

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(a) THE QUESTIONS PRESENTED FOR REVIEW:

1. Does the Supreme Court have a duty today to review undecided questions (unsettled guidelines) concerning the validity, construction and application of FRCP 23(a), either because (i) the lower federal courts as a whole have practically nullified its legal standard (ii) because there is a conflict between at least two lower federal courts (iii) because it involves an issue of imperative public importance or (iv) because the Rule is not reasonably effective for its intended purpose?

2. Is FRCP 23(a)(1) "on its face" violative of the United States Constitution 5th Amendment due process clause, because it's void for vagueness or substantial overbreadth?

3. Was FRCP 23(a)(1) "as applied"

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violative of the US Constitution 5th Amendment due process clause because of its overbreadth; or, because the District Court never concluded to "a legal certainty" that petitioner's complaint in no way could be amended to state a cause of action?

4. Did the District Court fail to give that "discriminating application" to FRCP 23(a) that is required (by Schlangenhauf v Holder) before it issued its order dismissing petitioner's complaint in its entirety with prejudice which sought a partitioning out of his numerically distinguishable cotenancy interest, against a purported class of seven low to moderate income defendant's that are geographically dispersed between two States & constitute a misapplication of law to fact? (FRCP 23)

5. Did the District Court's order

dismissing petitioner's complaint against Geraldine Gill individually, which sought a partitioning out of his numerically distinguishable cotenancy interest in real property, from a group of low to moderate income defendant's who are geographically dispersed between two States, constitute a misapplication of law to fact (FRCP 19), because the District Court did not conclude to a legal certainty that the complaint was in no way capable of stating a cause of action?

(6) Was Local Rule 7.11 of the Central District of California, unconstitutionally applied because it deprived petitioner of his day in court?

(b) LIST OF PARTIES TO THE DISTRICT COURT PROCEEDING: Michael A. Weiss; Geraldine Gill, Individually and on Behalf of Others Similiarly Situated.

(c) TABLE OF CONTENTS: (Page)

The Questions Presented for Review 1

A List of All Parties to the Proceeding in the District Court 3

Table of Contents & Authorities 4

Reference to the (Un)Official Reports of any District Court Opinion 8

Statement of Supreme Court Jurisdictional Grounds 8

The Constitutional Provisions and Statutes Which Case Involves 10

Statement of the Case 11

Basis for District Court Juris. 14

Argument Amplyfying Reasons for Allowance of Writ of Cert. 15

Appendix 61

TABLE OF AUTHORITIES (Page)

Aiken v Obledo, 442 F Supp 628 59

American Fire & Cas Co v Finn, 341 US 56, 71 S Ct 534, 95 L Ed 702 51

American Pipe & Const Co v Utah, 414 US 538, 94 S Ct 756, 38 L Ed 713 27

Ashe v Swenson, dissent, 397 US 436, 90 S Ct 1189, 21 L Ed 2d 469 51

Barney v Baltimore, 6 Wall, 18 L Ed 825 19

Cooper & Lybrand v Livesay, 98 S Ct 2454 57 L Ed 2d 551 58

Dale Electronics v RCL Elect., 53 FRD 531 58

Deleware v H & Co v Albany SR Co, 231 US 435, 29 S Ct 540, 53 L Ed 862 50

East Texas Motor Freight v Rodriguez

In re Gap Stores, 79 FRD 283 57

Gen Tel Co of Southwest v Falcon, 457 US 147, 102 S Ct 2364, 72 L Ed2d 740 (21,22)

Gen Tel Co of Northwest v EEOC, 446 US 318, 100 S Ct 1698, 64 L Ed2d 319 20

Ghilchrist v Bolger, 89 FRD 402 59

Ex Parte Harding, 219 US 363, 31 S Ct 324, 55 L Ed 252 21

Harris v Pan Am, 74 FRD 24 59

Hood v James, 256 F 2d 895 58,59

FRCP 82 24

Black, Justice (Re; FRCP 23 opinion) 29

International News Service v Assn Press 248 US 215, 39 S Ct 68, 63 L Ed 211 57

Fullilove v Klutznick, 448 US 448, 100 S Ct 2758, 65 L Ed 2d 902 29,33

Hanna v Plummer (Sibbach v Wilson) 380 US 460, 85 S Ct 1136, 14 L Ed 2d 8 57

Los Angeles Brush Mfg Co v James, 272 US 701, 47 S Ct 286, 71 L Ed 481 (9,56,53)

Mississippi Pub Corp v Murphree, 326 US 438, 66 S Ct 240, 90 L Ed 185 12

Norton v Mathews, dissent, 427 US 524, 96 S Ct 2771, 49 L Ed 2d 512 33

Rogers v Guaranty Trust, 288 US 123, 53 S Ct 80, 77 L Ed 512 23

Schlangenhauf v Holder, 379 US 104, 85 S Ct 234, 13 L Ed 2d 154 9,59

Sosna v Iowa, 419 US 393, 95 S Ct 553, 42 L Ed 532 57

BEST AVAILA

Surrowitz v Hilton Hotel, 383 US 363, 86 S Ct 845, 15 L Ed 2d 807 37

Swanson v Traer, 354 US 114, 77 S Ct 1116, 1 L Ed 2d 1221 44

US Alkali Export Assn v US, 325 US 196, 65 S Ct 1120, 89 L Ed 1554

Venner v Great Western, 209 US 24, 28 S Ct 328, 52 L Ed 666 41

Wetmore v Rymer, 169 US 115, 18 S Ct 293 42 L Ed 682 37

Wofford v Safeway, 78 FRD 460 23

Woods v Interstate Realty, 337 US 535, 69 S Ct 1235, 93 L Ed 1524 44

Zahn v International Paper Co., 414 US 291, 94 S Ct 505, 38 L Ed 2d 511 46

FRCP 1 27

FRCP 19, Note 1966 Amend "defects" 43

FRCP 23, Notes of Adv Comm 15

Cal Code of Civil Proc. §874.220 45

Order of 4-21-1980 US Supreme Ct 50

US Supreme Court Rule 18 8

Wheaton, Carl, Law Review Article 16

BLE COPY

28 USC 1254, 1651(a) 8

28 USC 1332, 1391(a), 2201, 2202 14

28 USC 2072 15

(d) REFERENCE TO (UN)OFFICIAL DISTRICT COURT REPORTS: None

(e) STATEMENT OF UNITED STATES SUPREME COURT JURISDICTIONAL GROUNDS:

(i) 28 USC 1254 provides in relevant part: "Cases in the courts of appeal may be reviewed by the supreme court by the following methods: (1) By writ of certiorari granted upon the petition of any party to a civil case, before or after rendition of judgment or decree."

(ii) 28 USC 1651(a) provides: "The supreme court may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

(iii) US Supreme Court Rule 18 provides: "A petition for writ of

certiorari to review a case pending in a federal court of appeals before judgment is given in such court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this court."

(iv) The issue here concerns the administration of federal law and the Supreme Court must use its powers to make the FRCP, and in particular FRCP 23 reasonably effective for the purpose had in view of its adoption as per Los Angeles Brush Mfg Corp v James.

(v) The Supreme Court will grant certiorari to review undecided questions (unsettled guidelines) concerning the validity, construction and application of FRCP 23 as per Schlangenhauf v Holder.

(vi) FRCP 23 may be challenged, as per Mississippi Pub Corp v Murphree, if there is a lack of adequate guidelines because the Supreme Court has never fully considered the nature of the limitation imposed by the words "so numerous that joinder is impracticable" as of 6-1-1984 the date when the present District Court order was signed, or as of 6-25-1984, the date when said order was entered on the District Court docket.

(vii) The Supreme Court will grant certiorari to resolve a conflict in decisions of lower federal courts regarding the construction and application of FRCP 23(a)(1) as per Schlangenhauf.

(f) THE CONSTITUTIONAL PROVISIONS AND STATUTES WHICH THE CASE INVOLVES:

US Constitution 5th Amendment due process clause; FRCP 23, FRCP 19; 28 USC 1332, 2201, 2202; Cal Code of Civil Procedure

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§§ 872.210; 872.710; 872.820; 872.830

(See Appendix for text)

(g) STATEMENT OF THE CASE:

This is an action for declaratory relief under 28 USC 2201 and 2202, brought for the purpose of determining whether petitioner had an absolute right to partition his undivided, but numerically distinguishable cotenancy interest in 107 acres of real property near Santa Rosa, California, pursuant to Cal CCP §§872.210, 872.710(b). In the District Court petitioner offered to amend his complaint as to parties and prayer, so as to receive only a declaratory order and not any additional incidental partition relief against Gill individ.

Petitioner is a resident of Los Angeles and a California citizen. This amicable action was commenced in the District Court for the Central District in Los Angeles, because it was convenient

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and economical for petitioner, and for Geraldine Gill, the class representative who are both of low to moderate income. Mrs. Gill is nearly 60 years of age, a widow, and a resident of Las Vegas, Nevada and a Nevada citizen, and owns about 12.67 acres. Two of the class members reside in Sacramento, CA., and each own 8 acres; one resides in Los Angeles and owns 12.67 acres; and of the remaining three class members, two permanently reside at the land site and own 27 and 8 acres respectively, and the one remaining class member lives on and off at the land site and owns 8 acres. The class action device was utilized to bring before the court, and afford due process to, the 7 cotenants, since FRCP 19 joinder was impossible.

The land is not unique, and in its raw and uncultivated condition is worth only $60,000. The land has remained

dormant since 1971 when most of the co-tenants acquired their interests. The local zoning commission will permit two houses to be erected thereon, and petitioner is the only cotenant who has filed an application to erect a house. The state of the title as indicated approximately above, is not disputed. There are no offsetting claims against petitioner.

No purported class members have made a formal appearance (by way of motion to intervene) except Geraldine Gill who has in effect waived all non-jurisdictional defects, and has asked the District Court to proceed to the sole issue concerning declaratory relief. Each class member has received a copy of every document filed in this case. No class member has objected to partition, but 3 have objected to the forum chosen.

The District Court dismissed petitioner's complaint in its entirety with prejudice for failure to join indispensable parties and lack of subject matter jurisdiction, after an OSC, and petitioners motions for declaratory relief and class certification were never heard. Petitioner never had a day in court and was not given permission to amend his complaint.

Petitioner has appealed the District Court order to the Court of Appeals for the Ninth Circuit and has lodged his brief but has proceeded no further. The entire record in this case consists of about 160 pages and 40 uncertified copies were mailed to your court clerk.

(j) BASIS FOR DISTRICT COURT JURISDIC:
28 USC 1332 (diversity of citizenship):
28 USC 2201, 2202 (declaratory relief):
28 USC 1391(a) (venue).

(j) ARGUMENT AMPLIFYING REASON FOR ALLOWANCE OF WRIT OF CERTIORARI:

Petitioner contends that more guideline precision is required by the Supreme Court in regards to the "numerosity" and "joinder" requirements of FRCP 23(a)(1). Petitioner contends that since Congress has delegated power to the Supreme Court to promulgate the FRCP, as per 28 USC 2072, the same tests which are used to determine the validity of congressionaly formulated laws must apply to the FRCP, ie strict scrutiny, vague for vagueness and overbreadth. The definition of "so numerous that joinder is impractical" has never been decided by any Supreme Court decision, but rather the people of this Union are referred to the prior construction of Equity Rule 38, and some law review articles. The FRCP 23 Notes of Advisory Committee on Rules, Note to Subdivision (a), provides in relevant

part: "This is a substantial restatement of former Equity Rule 38 as that rule has been construed...The rule adopts the test of former Equity Rule 38, but defines what constitutes a 'common or general interest.' For discussion of what constitutes 'numerous persons' see Wheaton, Carl, Representative Suits Involving Numerous Litigants, 19 Corn. L. Q. 399 (1934); Note 36 Harv L Rev 89."

The botton line of Wheaton's law review article requires a determination "whether under the peculiar circumstances of each case, it would result on the whole, in injustice not to allow such a proceeding." Wheaton's article provides in pertinent part as follows. "We must therefore see what numbers have, and have not, been held 'many' and 'numerous'. There is much confusion in the result. As few as three or four persons have been said to be 'many'...

Where there are a hundred or more interested, the courts have no difficulty in saying they are 'numerous.' Nor do they hesitate to say three or five are not 'numerous'. But in between these figures there is no unanimity. Thus, twenty, twenty-five, twenty-eight, thirty-five, thirty-seven, about fifty, about sixty, and over seventy-five have been said to be 'numerous'. On the other hand, twenty, thirty-one, thirty-five, thirty-five to forty, and more than forty have been held not to be 'numerous'. (p. 412, 413) 'A Question of Common or General Interest of Many Persons'. This phrase of the law has caused more trouble than any other portion thereof and has led to all conceivable results. One cannot find any outstanding weight of authority as to its proper interpretation. The writer believes it should be given

the broadest possible meaning. It is not difficult to decide what a 'common or general interest' means...The difficulties come in deciding what is meant by 'question' and 'many'" (p. 433) "In reaching a conclusion as to the meaning of 'many' as found in this division of the law, one must look at the statute in its entirety. (p. 434) The right way to translate this enactment is to say that there can be a representative suit only when there is a class of persons having a common interest in certain questions of law and facts, which individuals are so numerous that, under the peculiar circumstances it would result, on the whole, in injustice not to allow such a proceeding. Whether or not such a question exists should be left to the court before whom the case comes." (p. 435)

Petitioner contends that the legal standard, phrased in terms of 'whether it would result on the whole, in injustice not to allow such a proceeding', is insufficient to guide a reasonable man trying to comply with the law and is thus void for vagueness or substantial overbreadth. Judges may understand the legal standard, but what about persons like petitioner who was not a lawyer and filed his complaint in pro per? In our American jurisprudence adversary system, it is up to a litigant to plead "class" in the first place, and then it is up to a judge to rule on the plea.

The Supreme Court in Barney v Baltimore said: "We are therefore of opinion that the circuit court could render no decree on the merits of this case without having rightfully before it some person representing the interest of

the Ridgley's." The Court was referring to William Ridgley, Mitilda Ridgley, and Ann Ridgley. Hence 3 persons could have constituted a class in that partition suit. That partition suit should govern this partition suit according to FRCP 23 advisory notes which adopted the former construction of Rule 38. If 3 were OK there, 7 should be OK here, assuming all other conditions were the same.

The Supreme Court in General Tel Co of the Northwest v EEOC said: "The numerosity requirement requires examination of the specific facts of each case and imposes no absolute limitatations. Title 7 however, applies to employers with as few as 15 employees. When judged by the size of the putative class in various cases in which certification has been denied, this minimum would be too small to meet the

numerosity requirement...It is also apparent that forcing EEOC actions into the FRCP 23 model would in many cases distort the Rule as it is commonly interpreted and in others foreclose enforcement actions not satisfying prevailing Rule 23 standards but seemingly authorized by §706(f)(1)...We note finally that the adequacy of representation is typically construed to foreclose the class action where there is a conflict of interest between the named plaintiff and the members of the putative class."

Petitioner points out that there were only 14 class members in the case of General Tel Co of Southwest v Falcon, which also reached the Supreme Court regarding a EEOC dispute. Petitioner does not understand why 14 were OK in one case and 15 was not OK in the other case. See Ex Parte Harding, 219 US at 378 for an appropriate resolution.

Use of the phrases "when judged by the size in various cases"; "prevailing FRCP 23 standards"; or "typically construed"; are inadequate guidelines for the case by case rigorous anyaysis required by FRCP 23 and the US Constitution 5th Amend due process cl. Using these phrases in regards to the numbers required in a class action distorts the legal standard announced by Wheaton and tends to preclude efficient findings of facts.

The Supreme Court in General Tel. Co of Southwest v Falcon said: "We granted certiorari to decide whether the class action was properly maintained on behalf of...The commonality and typicality requirements of Rule 23(a) tend to merge...Those requirements therefore also tend to merge with the adequacy of representation requirement, although the latter requirement also raises concerns

about the competency of class counsel and conflicts of interest."

Petitioner contends "numerosity" and "joinder" merge and tend to cause confusion.

A lower federal court in Wofford v Safeway Stores Inc., said: "A great problem...is the substantial overlap among the subsections of Rule 23 and the confused state of the law as to what each requires."

The Supreme Court in Rogers v Guaranty Trust Co of New York said: "Obviously no definite rule of general application can be formulated by which it may be determined under what circumstances a court will assume jurisdiction of stockholders suits relating to the conduct of internal affairs of foreign corporations. But it may safely be said that jurisdiction will be declined whenever considerations of convenience,

efficiency, and justice point to the courts of the state of the domicile as appropriate tribunals for the determination of the particular case."

Petitioner compares class actions to stockholder suits and contends that the factors cited in Rogers are really akin to political expediency, a standard inappropriate to the judicial branch. However, because Congress delegated power to the Supreme Court to promulgate the FRCP, the Supreme Court may consider such policy factors. But it cannot give implementing standards that permit invidious discrimination or inadequate findings of facts. Nor can it give implementing standards that contravene FRCP 82 which provides: "These rules shall not be construed to extend or limit the jurisdiction of the United States District Courts or the venue of actions therein."

Petitioner contends that the guidelines "prevailing standards," and "commonly construed" tend to limit the jurisdictional result. The lower federal courts typically construe FRCP 23(a)(1) to require more than 30 members. Petitioner contends his 7 member class is entirely appropriate because he has diversity of citizenship; a controversy in value exceeding $10,000; proper venue; and a convenient and economical means of achieving the desired result, which does not overburden the court nor vex or take advantage of the class members. Petitioner contends that his complaint was unconstitutionally dismissed because the District Court invoked the "commonly construed" numerosity requirement.

The Supreme Court in Coopers & Lybrand v Livesay said: "Respondents argue that the class action serves a vital public interest and therefore,

special rules of appellate review are necessary to ensure that district judges are subject to adequate supervision and control. Such policy arguments though proper for legislative consideration, are irrelevant to the issue we must decide...The formulation of an appealability rule that turns on the amount of the plaintiff's claim is plainly a legislative, not judicial, function...Without a legislative prescription, an amount in controversy rule is necessarily an arbitrary measure of finality because it ignores the variables that inform a litigants decision to proceed, or not to proceed, in the face of an adverse class ruling. The arbitrariness of this approach is exacerbated by the fact that the Courts of Appeals have not settled on a specific jurisdictional amount; rather they have simply determined on an ad hoc basis whether the plaintiff's

claim is too small to warrant individual prosecution."

Under FRCP 1 ("Every" action) how can lower fd cts. typically require over 30 members without a legislative prescription?

The Supreme Court in American Pipe & Const Co v Utah said: "The determination to disallow the class action was made upon considerations that may vary with such subtle factors as experience with prior similiar litigation or the current status of a courts docket... Indeed one commentator has observed that 'the federal decisions under original Rule 23(a) reflect...a contrariety of opinion as to the meaning of 'numerous.' 3 B J. Moore, Federal Practice p. 23-272 para. 23.05. Criticisms of FRCP 23 and its impact on the federal courts have been both numerous and trenchant, see eg American College of Trial Lawyers,

Report and Recommendations of the Special Committee on Rule 23 of the FRCP (1972); H. Friendly, Federal Jurisdiction; A General View 118-120 (1973); Handler, The Shift from Substantive to Procedural Innovations in Antitrust Suits-The 23rd Annual Antitrust Review, 71 Col L Rev 1, 5-12 (1971)."

American was cited for the proposition that even the Supreme Court has recognized that FRCP 23(a)(1) could stand a little more precision in regard to its proper construction and application; or else that it is not reasonably effective for its intended purpose, according to some. Petitioner compares the use of 'subtle factors' in FRCP 23 to the use of 'probable cause' in 4th Amendment cases. But there a wealth of case law which contain specific (not typical) factfindings exist which can adequately guide pro per litigants.

Wetmore v Rymer, cited later, would permit use of subtle factors, but only if the findings of facts are made to appear to a legal certainty.

Justice Black said: "It seems to me that they (the 1966 amend to FRCP) place too much power in the hands of trial judges, and that the rules might almost as well simply provide that class suits can be maintained either for or against particular groups whenever in the discretion of a judge, he thinks it is wise." See Order of 2-28-1966, front pages of the FRCP.

Petitioner does not object to a power delegation but he does believe that the discretion must be supported by stated facts in class action (un) certification orders. (Fullilove v Klutznick)

Equity Rule 38 was promulgated in 1912, and so the class action rules have

been on the books for 72 years. Yet there is still no Supreme Court adequate guideline for determining 'numerosity' except 'whether there will be injustice, on the whole, not to allow such a proceeding.' The fact that that guideline is not reasonably effective for its intended purpose may be inferenced by hundreds if not thousands of cases which dismiss a complaint JUST BECAUSE the class does'nt have 30 or more members. For these reasons petitioner requests the Supreme Court to free lower federal courts of prior guidelines such as "typically construed" and "prevailing FRCP 23 standards" etc., and give him and the people of this Union more precise and settled guidelines concerning FRCP 23(a)(1).

Because class actions 'typically tend' to involve large segments of this Union's population, and because there

are thousands of class actions on the federal court dockets being typically dismissed, petitioner contends that his case involves an issue of 'imperative public importance' as that phrase must be construed in US Supreme Court Rule 18. A stitch in time today, may save nine tomorrow.

Petitioner contends that the 'typically construed' numerosity guideline has given lower federal courts difficulty in administering FRCP 23. With insufficient guidelines, petitioner asks whether these lower federal courts are really competent to decide the issue Take petitioner's case for example. The District Court's OSC re Dismissal states: "Plaintiff asserts that a class action is appropriate in this case because joinder of all 7 defendant's would destroy diversity and therefore be 'impractical.'" It's order dismissing action says

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"...the Court now concludes that FOR THE REASONS STATED IN THE OSC filed May 24, 1984, this action should be dismissed in its entirety." Petitioners Response to OSC re Dismissal said: "Plaintiff concedes he was wrong in framing his complaint to give the impression that the sole factor in determining 'impracticability' in FRCP 23 was whether diversity of jurisdiction would be defeated...Plaintiff asserts that all the factors and circumstances of the case are factors to be considered in determining whether joinder of persons is impractical and thus the need for a class action device is appropriate. In the following papers plaintiff will argue the relevant facts and circumstances of his case in an effort to meet his burden of proof under the above stated standard."

Petitioner contends that the

District Court should have given more time and attention to the arguments stated in his Response to the OSC re Dismissal and gone over each and every fact, including numerosity, or at least made some reference to such facts. Rather it appears to have typically relied on the 'numbers game' to support its OSC and its order dismissing action and nothing else. Petitioner contends that this would not be a competent decision. (Fullilove v Klutznick)

Justices Stevens, Brennan and Marshall joined in the dissent to Norton v Mathews saying: "Nor can I accept the Secretary's argument that a plaintiff class may never be properly certified in a §205(g) action or that no class could be properly certified in this case... The Secretary asserts that a limited class would not satisfy the 'numerosity' requirement of FRCP 23(a)(1). But as a

general matter one surely cannot say that this requirement could never be satisfied in any §205(g) action that might be brought."

The District Court appears to say that there can never be a class action declaratory relief suit when there are only 7 class members.

Petitioner was never given his day in court. The whole case was decided without any appearance or oral argument by petitioner despite the fact that in his Notice of Motion and Motion for Certification and Declaratory Relief, petitioner stated his grounds would include "such other and further grounds as may be presented to the court at the hearing." At 5 pm on the Friday before the scheduled Monday morning hearing, petitioner was told by phone by the clerk that the judge would determine the motion issues without oral

argument, and not to appear. Local Rule 7.11 for the Central District permits this, but petitioner contends that it was unconstitutionally invoked.

The District Court appears to petitioner to have spent only 15 minutes in drafting its OSC re Dismissal, and only 5 minutes in drafting its dismissal order. Petitioner contends the District Court should have given a 5 to 7 page opinion (order) devoting at least 100 words on the class action facts alone. The District Court appears to have given no consideration to the facts concerning convenience, expense, geography, age, etc.

The same due process violation, to wit; lack of factfindings and opportunity to be heard, may be said to have occurred regarding the FRCP 19 indispensable parties issue. Petitioner's Response to the OSC re Dismissal states: "Plaintiff's complaint states that

tenants in common to an action in which partition/sale is sought are usually indispensable parties. Plaintiff after further research on the issue concedes that before a forced sale is ordered, all of the tenants in common must be parties because of the familiar principle that no mans rights (personal or property) can be adjudicated upon in his absence. However, if only plaintiff's distinct 38/324th co-tenancy interest is partitioned out to him, none of the tenants in common need be parties for the reason that such a court order merely changes the form of the state of title. None of the other co-tenants rights (personal or property) would be adjudicated upon, and they would remain exactly as they were before."

The District Court's OSC re Dismissal merely says "...the purported class members would appear to be both

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necessary and indispensable parties to this action which seeks partition of the parties respective interests in the property." It should have said "it appears to a legal certainty..." if it wanted to dismiss a complaint with prejudice, as per Surrowitz v Hilton Hotel and Wetmore v Rymer.

The Supreme Court in Wetmore v Rymer said: "But under the act of 1875, the trial court is not bound by the pleadings of the parties, but may, of its own motion, if led to believe that its jurisdiction is not properly invoked, inquire into the facts as they really exist. The statute does not prescribe any particular mode in which the question of the jurisdiction is to be brought to the attention of the court, nor how such question when raised, shall be determined. And it would appear to have been the intention of Congress to leave the mode of raising

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and trying such issues to the discretion of the trial judge. And if the court takes to itself the determination of the disputed questions, it is imperative in order to give effect to the intention of Congress, that its action must take a form that will enable this court to review it, so far as to determine whether the conclusion of the court below was warranted by the evidence before the court. Thus, in the case of Barry v Edmunds, where the judgment of the circuit court dismissing the cause, because in its opinion the matter in dispute did not amount to the jurisdictional value, was reversed, it was said: 'In making such an order, therefore, the circuit court exercises a legal, and not a personal discretion which must be exercised in view of the facts sufficiently proven, and controlled by fixed rules of law. It might happen that the

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judge on the trial or hearing of the cause would receive impressions amounting to a moral certainty that it does not really and substantially involve a dispute or controversy within the jurisdiction of the court. But upon such a personal conviction, however strong, he would not be at liberty to act unless the facts on which the persuasion is based, when made distinctly to appear on the record, create a legal certainty of the conclusion based on them. Nothing less than that is meant by the statute when it provides that the failure of jurisdiction, on this account, shall appear to the satisfaction of said circuit court.' ...And when the defendant has not so pleaded as to entitle him to object to the jurisdiction and the objection is taken by the court of its own motion, justice requires that the plaintiff should have an opportunity

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to be heard upon the motion and to meet it by appropriate evidence...This court must therefore consider whether the judgment of the circuit court dismissing the suit for want of jurisdiction was warranted by the facts of the case as they are disclosed in the record."

Wheaton requires a determination whether ON THE WHOLE it would result in injustice not to allow such a proceeding and says that one must look to the statute in its entirety, infering that each element should be addressed. The District Court appears to have ignored or improperly discounted all the facts regarding FRCP 23(a)(2)(3)(4) in place of a numbers determination. It should have factually addressed the 4 factors of FRCP 23(a) as well as the 4 factors of FRCP 19(b). Then it should have said: "it appears beyond a preponderance of the evidence, and to a legal certain-

ty, that under FRCP 23 and 19, this action cannot proceed according to equity and good conscience, and is therefore dismissed in its entirety with prejudice."

The dismissal in the Rymer case for lack of jurisdiction was proper because the issue concerned the amount in controversy. But in petitioner's case his complaint was dismissed for lack of jurisdiction because of nonjoinder of indispensable parties. Petitioner contends that the dismissal should have been on equity considerations, not jurisdictional considerations; and this in turn requires an address concerning the peculiar facts of petitioner's case.

The Supreme Court in Venner v Great Western R Co said: "It has already been shown that the plaintiff in his petition did not bring this case within the terms of the 94th rule in equity (stockholder

derivative suit). Neither the rule nor the decision from which it was derived deal with the question of the jurisdiction of the courts but only prescribes the maner in which the jurisdiction shall be exercised. If a controversy of this general nature is brought in the circuit court and the necessary diversity of citizenship exists, but upon the pleadings or proof, it appears that the plaintiff has not shown a case within the decision of Hawes v Oakland, or the rule of the court declaratory of that decision, the bill should be dismissed for want of equity and not for want of jurisdiction. The jurisdiction of the circuit court is prescribed by the laws enacted by Congress in pursuance of the Constitution, and this Court by its rules has no power to increase or diminish the jurisdiction thus created, though it may regulate its exercise in

any manner not inconsistent with the laws of the United States." Cf Illinois C.R. Co v Adams.

The District Court was confused and in error when it said "this action is dismissed with prejudice on the question of federal jurisdiction..."

In FRCP 19, 1966 Amendment Note "Defects in Original Rule" it is said: "But persons holding an interest technically 'joint' are not always so related to an action that it would be unwise to proceed without joining all of them... The original rule...used 'jurisdiction' in the sense of the competence of the court over the subject matter of the action... However, by a familiar confusion, the expression seems to have suggested to some that the absence from the lawsuit of a person who was 'indispensable' or 'who ought to be a party' itself deprived the court of the power to adjudicate as be-

tween the parties already joined....In some instances courts did not undertake the relevant inquiry or were misled by the 'jurisdiction' fallacy. In other instances there was undue preoccupation with abstract classifications of rights or obligations as against consideration of the particular consequences of proceeding with the action and the ways by which these consequences might be ameliorated by the shaping of final relief or other precautions."

The Supreme Court in Woods v Interstate Realty Co., and Swanson v Traer, said in effect that State law controls as to standing to sue in diversity cases as against Gill Individually

petitioner merely sought a declaration that partition was more equitable than a forced sale. But even if petitioner sought partition he would have had standing in a California State court.

The resulting judgment would not have been a nullity for failure to join any cotenants of record. Rather the judgment would not bind those persons, as per Cal Code of Civil Procedure §874.220 which provides in part: "the judgment does not affect the interest of any person who was not a party to the action and who had an interest of record." Petitioner in his papers said that upon receiving a federal declaratory order he could possibly have used it as offensive collateral estoppel in a State court partition suit, where all the cotenants were made parties individually. Complete federal relief would have been accomplished as to petitioner. Alternatively, petitioner suggested the District Court make its declaratory order in his individual suit against Geraldine Gill, and thereafter

invoke ancillary jurisdiction in enforcement proceedings over the other cotenants.

Justices Brennan, Douglas and Marshall joined in the dissent to Zahn v International Paper Co. saying: "Ancillary jurisdiction to adjudicate claims that cannot be fitted within the aggregation rules has long been recognized by this Court (cites). Class action under FRCP 23(b)(3) are equally appropriate for such treatment. Unless the class action is permitted, many of the claimants will be unable to obtain any federal determination of their rights... The fact that many of these landowners claims are likely to be worthless because the cost of asserting them on a case by case basis will exceed their potential value will do no judicial system credit...Not only does the practical desirability of sustaining

ancillary jurisdiction bring FRCP 23(b)(3) class actions within the logic of our decisions, but the Court has long since recognized that fact, and has sustained ancillary jurisdiction over the nonappearing members in a class action who do not meet the requirements of traditional rule of complete diversity laid down in Strawbridge v Curtiss. In Supreme Tribe of Ben Hur v Cauble, the Court not only held that only the original named plaintiff's and defendant's had to satisfy the diversity requirement, but it also stated that intervention by nondiverse members of the class would not destroy the District Court jurisdiction...The Court also appears to rely on Snyder's rejection of 'the notion that the 1966 amendments to FRCP 23 were intended to effect or effected, any change in the meaning and application of the jurisdictional amount

requirement insofar as class actions are concerned...Reliance on FRCP 82 was proper because there petitioner contended that the restructuring of FRCP 23 to abolish 'spurious' class actions in favor of a 'functional' approach that took into account the nature of the litigation and its effects, undercut this Courts long line of decisions establishing the minimum requirements for diversity jurisdiction over a 'civil action.' But this case presents no suggestion that the 1966 amendments override the Courts decisions construing 28 USC 1332. The 1966 amendments, if anything, merely made the determination whether the class should be permitted to turn more directly on the kinds of concerns that have motivated the exercise of ancillary jurisdiction... As the Reporter to the Advisory Comm on Civil Rules has observed: 'From the

start the Civil Rules elaborating and complicating actions through joinder of claims and parties, have profoundly influenced jurisdictional result.' 81 Harv L Rev 356 at p 400 (1967). The Court's prior decisions upholding novel exercise of ancillary jurisdiction have made liberal use of the opportunities presented by the Civil Rules and amendments and FRCP 82 has stood as no bar to that action."

Petitioner contends that partition suits are not governed by the theory underlying compulsory counterclaims, because the defendant cotenants may not dispute the partition request, as was the case here. The joining of cotenants is more akin to the theory underlying the "formal parties" doctrine over which ancillary juriscition is permitted. Vattier v Hinde and its progeny were cited to the District Court. Shaping of

of relief options under FRCP 19(b) were offered to the District Court this way.

Mr Justice Black observed: "The principal function of procedural rules should be to serve as useful guides to help, not hinder, persons who have a legal right to bring their problems before the courts." (Order of 4-29-1980 footnote 8, adopting and amending Rules)

Under a FRCP 23 "functional" exam the Dist Ct. should have factually addressed the nature of the litigation (declaratory relief or partition) as well as the shaping of relief options tendered The failure is not harmless but incompet.

The Supreme Court in Deleware & H. Co. v Albany S. R. Co. said: "Equity Rule 94 is intended to have practical operation and to have that it must, as to its requirements, be given such play as to fit the conditions of different cases."

BEST AVAILA

The Supreme Court in American Fire & Cas Co v Finn noted the Revisors Note to 28 USC 1441 which read: 'Rules 18,20, and 23 of the FRCP permit the most liberal joinder of parties, claims and remedies in civil actions."

Mr Justice Brennan, Douglas and Marshall, who joined dissenting to Ashe v Swenson said: "The FRCrimP liberally encourages the joining of parties and charges in a single trial...The same thought is reflected in the FRCP. A pervasive purpose of those rules is to require or encourage the consolidation of related claims in a single lawsuit. FRCP 13, 18, 19, 20, 23 and 24. Flexibility in the rules governing the structure of civil litigation is appropriate in order to give the parties the opportunity to shape their own private lawsuit provided that injustice, harassment, or an undue burden on the courts

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does not result."

Petitioner bent over backwards to cure any defects in his complaint, but the District Court acted oppositely.

The Supreme Court in Schlangenhauf v Holder said: "After the Court of Appeals denied mandamus, the order was corrected by the District Court to reduce the number of examinations to the 4 requested. We agree with respondent that the issue of that error has become moot. However, the fact that the District Court ordered 9 examinations is not irrelevant together with all the other circumstances in the consideration whether the Dist. Ct. have given to the petition...that discriminating application which FRCP 35 requires...We granted certiorari to review undecided questions concerning the validity and construction of FRCP 35...The meaning of FRCP 35's requirements of 'in controversy' and

'good cause' also raised issues of first impression...Normally, wise judicial administration would counsel remand of the cause to the Court of Appeals to reconsider this issue of 'good cause'. However in this instance the issue concerns the construction and application of the FRCP. It is thus appropriate for us to determine on the merits the issues presented and to formulate the necessary guidelines in this area. As this Court stated in Los Angeles Brush Mfg Corp v James: 'We think it clear that where the subject concerns the enforcement of the...rules which by law it is the duty of this court to formulate and put in force... it may...deal directly with the District Court.'...This is not to say however that following the settling of guidelines in this opinion, any further allegations that the District Court was in

error in applying these guidelines to a particular case makes mandamus an approprate remedy. The writ of mandamus is not to be used when 'the most that could be claimed is that the district courts have erred in ruling on matters within their jurisdiction... Rule 34's 'good cause' requirment is not a mere formality, but a plainly expressed limiation on the use of that Rule. They are not met by mere conclusionary allegations of the pleadings, nor by mere relevance to the case, but require an affirmative showing by the movant that each condition as to which the exam is sought really and genuinely is in controversy and that good cause exists for ordering each particular exam. Obviously what may be good cause for one type of exam may not be so for another. FRCP 35 therefore requires discriminating application by the trial

judge who must decide the existence of 'in controversy' and 'good cause.'"

Petitioner contends that most of the things said regarding 'good cause' and 'in controversy' applies to FRCP 23 regarding 'numerosity' and 'impractical of joinder.' Petitioner requests a record review and a decision on the merit

The Supreme Court in General Tel Co of Southwest v Falcon cited a concurring opinion of Judge Godbold wherein he emphasized the need for 'more precise pleadings.' The Court then said "With the same concerns in mind we reiterate today that a Title 7 class action, like any other class action, may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of FRCP 23(a) have been satisfied."

Petitioner offered to amend his complaint and present more precise

pleadings, but the offer was rejected.

The Supreme Court in Los Angeles Brus Mfg Corp v James said: "If it clearly appeared that a practice had been adopted by District Judges as to the order of procedure in hearing causes at variance with the equity rules, our writ might well issue directly to such judges Were we to find that the rules have been practically nullified by a District Judge, or by a concert of action on the part of several District Judges, we would no hesitate to restrain them."

Petitioner repeats his prior argument concerning phrases such as "the prevailing FRCP 23 standards" and "typically construed" here to show concert of action precluding finding of facts. The pattern of stopping at FRCP 23(a)(1) has denied petitioner access to federal court and thus denied him statutory (28 USC 1332) and constitutional (due

process) rights and has thus triggered the "strict scrutiny test." See Hanna v Plumer and Sibbach v Wilson.

The Supreme Court in Sosna v Iowa said: "The parties stipulated that there were in the State of Iowa 'numerous people in the same situation as plaintiff that joinder of those persons was impracticable, that appellants claims were representative of the class, and that she would fairly and adequately protect the interests of the class. This stipulation was approved by the District Court....While the parties may be permitted to waive nonjurisdictional defects they may not by stipulation invoke the judicial power..." Cf. International News Service v Assoc Press and East Texas Motor Freight System Inc v Rodriguez.

Petitioner contends that the only issue raised by the parties in the District Court was whether partition was

more equitable than a forced sale of the property. Any class action defects were waived by the class representative and petitioner. See the document entitled "Waiver of Timely Service of Process," and supporting allegations in petitioners moving and responding papers which were not objected to by Mrs. Gill.

Re: Conflict between lower federal courts. A lower federal court in In re Gap Stores Securities Litigation cited Dale Electronics in which 13 members were found to have constituted a class. Petitioner cited this case and the Dale case as well as others which had 7 or less members. These cases are in conflict with the District Court in so far as 'numerosity' is concerned.

In regards to 'joinder' the District Court cited Hood v James. But that case is distinguishable because petitioner merely seeks a declaratory order and not

a partition or forced sale, and because the facts indicate that all the co-tenants, except Mrs Gill, could care less whether petitioner partitioned out or not.

The Hood court said: "every shareholder is vitally interested if not indispensable to a suit of this nature which seeks to amend or terminate the trust indenture...They should not be remitted to class representation under FRCP 23. Their joinder would have defeated federal jurisdiction."

A lower federal court in Aiken v Obledo said: "The geographic distance between this forum and applicants who would become part of the proposed class is so great that joinder would be difficult." This case along with the Ghilchrist and Harris cases cited in the table of authorities, appear to be in conflict with the District Court in so far as geographic dispersion is concerned

Petitioner concludes that the importance of the 'numerosity' and 'joinder' requirements of FRCP 23(a)(1) which has engendered a great divergence of views, if not actual conflict, among the lower federal courts, should lead the Supreme Court today to grant certiorari and resolve the situation and give settled implementing guidelines which require constitutional findings of facts.

Dated: October 6, 1984

Respectfully Submitted

Michael A Weiss

Petitioner, Pro Per

APPENDIX

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MICHAEL A. WEISS, Plaintiff, vs. GERALDINE GILL et al Defendants	No. CV84-2120 PAR ORDER DISMISSING ACTION

Having ordered plaintiff to show cause why this action should not be dismissed for failure to join indispensable parties and lack of subject matter jurisdiction and having reviewed the response filed by plaintiff on June 8, 1984, the Court now concludes that, for the reasons stated in the Order to Show Cause filed May 24, 1984, this action should be dismissed in its entirety. Accordingly

IT IS HEREBY ORDERED that:

1. This action is dismissed with

prejudice on the question of federal jurisdiction but without prejudice to the merits of plaintiff's claims;

2. The matter is taken off the Court's calendar;

3. The Clerk shall serve copies of this order by United States mail on all counsel of record.

Dated: June 20, 1984

Pamela Ann Rymer
United States District Judge

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28 USC 2201: "In a case of actual controversy within its jurisdiction...any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking seeking such declaration, whether or not further relief is or could be sought."

FRCP 23: (a) One or more members of a class action may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable.
FRCP 19: (b) If a person as described in subdivision (a)(1)-(2) hereof cannot be made party the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed the absent person thus being regarded as indispensable.
Local Rules for Central District 7.11: The court may dispense with oral argument on any motion except where an oral hearing is required by statute, the FRCP or these local rules.
Cal. Code of Civil Procedure §872.710: (b) Partition as to concurrent interests in the property shall be as of right.
Cal Code of Civil Procedure §872.820:

The court shall order that the property be sold and the proceeds divided in the following situations; (b) the court determines that under the circumstances sale and division of the proceeds would be more equitable than division of the property.

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PROOF OF SERVICE

I, Jane Weiss, am a resident of the County & State of California, and am over 18 years of age. I am not a party to the within action and my residence address is 2880 Motor Ave., Los Angeles Cal. 90064. The list of parties here are Geraldine Gill, Individually and on behalf of Others Similiarly Situated, and petitioner. All parties required to be served have been served. This service is made pursuant to United States Supreme Court Rule 28(c). I effected service of this petition for

writ of certiorari, by placing a true copy thereof, enclosed in a sealed envelope addressed as follows: Geraldine Gill, Individually and On Behalf of Others Similiarly Situated; 1949 Ludington Ave., Las Vegas, NV 89115; Lawrence Goldstein Esq., 926 J Bldg. Ste. 1118, Sacramento, CA. 95814; Stanley Gale Esq., 1214 F Street, Sacramento, CA. 95814; Malcolm Manwell, Esq., 635 First St., Santa Rosa, CA. 95404.

I caused such envelopes with postage thereon fully paid to be placed in the United States mail at Los Angeles Cal. I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct.
Executed on October 9, 1984.

Jane Weiss

Jane Weiss